No. 18-966

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF COMMERCE, *ET AL.*,

Petitioners,

—v.—

STATE OF NEW YORK, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO
THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* COMMON CAUSE *ET AL.* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Common Cause was founded by John Gardner in 1970 as a nonpartisan "citizens lobby" whose primary mission is to protect and defend the democratic process and make government accountable and responsive to the interests of ordinary people, and not merely to those of special interests. Common Cause is one of the nation's leading democracy organizations and currently has over 1.2 million members and supporters nationwide and local chapters in 25 states, including states that will be disproportionately impacted by the inclusion of a citizenship question on the 2020 Census, including California, Colorado, Illinois, New York, Pennsylvania, Rhode Island, and Texas. Common Cause has been a leading advocate for policies that ensure a responsive and representative government.

Common Cause filed an *amicus* brief in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016). Common Cause also filed *amicus* briefs in litigation concerning Secretary Ross's decision to include a citizenship question on the 2020 Census in both the U.S. District

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[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* Trevor Potter, Rep. Jody L. McNally, Justice Robert Orr (Ret.), Gil Ontai, Peter Yao, and their counsel represent that they have authored the entirety of this brief, and that no person other than the *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

Consent of all parties has been provided for *amici curiae* to file this brief. Respondents and Petitioners each provided consent to the filing of *amicus curiae* briefs in support of either party or neither party in docket entries dated February 27, 2019 and March 20, 2019, respectively.

Court for the Southern District of New York and the U.S. District Court for the Northern District of California. *New York v. U.S. Department of Commerce* (*New York*), 351 F. Supp. 3d 502 (S.D.N.Y. 2019); *California v. Ross* (*California*), Nos. 18-cv-01865 & 18-cv-02279, 2019 U.S. Dist. LEXIS 36230 (N.D. Cal. Mar. 6, 2019).

Common Cause is also a leading organization challenging the practice of partisan gerrymandering. Common Cause is the lead plaintiff in the challenge to the congressional gerrymander in North Carolina that was argued before the Court on March 26, 2019. *Rucho, et al. v. Common Cause, et al.*, No. 18-422, *consideration of appellate jurisdiction postponed to hearing on merits*, 586 U.S. ___ (Jan. 4, 2019) (appealing the three-judge district court's decision in *Common Cause et al. v. Rucho et al.*, 1:16-CV-1026 (M.D.N.C.)).

Amicus curiae Trevor Potter is a former Republican Chairman of the Federal Election Commission. He is one of the country's most prominent and experienced campaign and election lawyers, and served as general counsel to John McCain's 2000 and 2008 presidential campaigns. Mr. Potter is currently the President of the Campaign Legal Center, a nonprofit nonpartisan organization that fights the current threats to our democracy in the areas of campaign finance, voting rights, redistricting, and ethics. Mr. Potter has long been engaged with good government issues and has served as *amicus curiae* in a number of cases.

Amicus curiae Representative Jody L. McNally is a Republican representative in the Strafford 10 district

in the New Hampshire House of Representatives. As an elected representative, she has a vested interest in ensuring a full and accurate count in the 2020 Census.

Amicus curiae Justice Robert Orr is a retired Associate Justice of the North Carolina Supreme Court. Justice Orr was elected as a Republican to the Supreme Court and is a former Republican candidate for governor of North Carolina. After retiring from the Supreme Court, Justice Orr headed the North Carolina Institute for Constitutional Law. Justice Orr has also served on the United States National Park System Advisory Board, as an adjunct faculty member at North Carolina Central University ("NCCU"), and as a member of the Board of Visitors for NCCU's Law School. A former justice and a constitutional scholar, Justice Orr is dedicated to the rule of law and the preservation of our system of representative government.

Amicus curiae Gil Ontai is a practicing architect, past campus director, and faculty member at Springfield College. He served as a city redevelopment board director for San Diego's downtown district and as a city planning commissioner for 8 years. For over 30 years, he has been active in a wide-range of professional, educational, health, civic, and multi-cultural organizations. Mr. Ontai is registered with the Republican party and lives in the City and County of San Diego. Through his experience on the California Citizen's Redistricting Commission, he saw firsthand how a fair and accurate Census impacts the redistricting process and ultimately the representation of all Californians.

Amicus Curie Peter Yao is a registered Republican who served two terms on the City Council for the City of Claremont ending in 2010. He was the city Mayor in 2006 and 2007. During his tenure, the City completed a consensus-based city General Plan to which the City adheres as a guideline for long term economic development and for budget priorities. He advocated for the completion of the first affordable housing in this upscale community in the pursuit of economic diversity. His experience as an elected city councilman and as Mayor gave him a clear understanding of how accurate census data is a key factor in effective local government. Mr. Yao is a Commissioner on the California Independent Citizen's Redistricting Commission. Through his experience on the California Citizen's Redistricting Commission, he saw firsthand how a fair and accurate census impacts the redistricting process and ultimately the fair representation of all Californians.

SUMMARY OF THE ARGUMENT

In our constitutional democracy, *all* persons who reside within the United States—including noncitizens—are granted the equal right to be represented by a member of Congress. This core constitutional principle is as old as our democracy itself. The Founders introduced it in Article I, Section 2 of the Constitution, and the country reaffirmed and perfected it in the Fourteenth Amendment. Although the right to vote in federal elections has expanded over time, it has always been the case that the right to representation in Congress belongs to persons, not to voters or citizens.

The primary constitutional purpose of the Census is to ensure that our constitutional commitment to equal representation of all persons is fully realized. Nevertheless, Secretary Ross has decided to include a citizenship question on the 2020 Census, despite—or, perhaps, precisely because of—the fact that doing so will cause undercounts in areas with large noncitizen populations. This, in turn, will mean that certain states stand to lose representation in Congress based on the undercounting of certain demographic groups.

In reaching a final disposition on the merits of this case, the Court should consider not only the harmful impact of the citizenship question, but also the clear constitutional purpose of Article I, Section 2. Secretary Ross's failure to account for the risk that including a citizenship question on the 2020 Census would undermine the fundamental constitutional principle of equality of representation is an important reason that his decision to add the question violates both the Enumeration Clause and the Administrative Procedure Act ("APA"). The core constitutional value embodied in Article I, Section 2, the right to equal representation—"the right to be counted and represented"[2]—should inform the Court's analysis of the claims in this litigation.

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[2] *Fed'n for Am. Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 576-77 (D.D.C. 1980) (three-judge district court) (quoting 86 Cong. Rec. 4372 (1940)).

ARGUMENT

I. Equal representation of persons is the core constitutional value embedded in the text of Article I, Section 2, as amended by the Fourteenth Amendment.

A. The Founders agreed that all persons—not just citizens—must be included in the representation base for members of Congress.

Equal representation of all persons in the United States is, and has always been, a foundational principle of our republican system of government. The Founders firmly believed that all persons living in the United States must be included in the representation base for Congress. They enshrined this belief in Article I, Section 2 of the Constitution, which apportions congressional representatives based on an "actual Enumeration" of the residents of each state.

The Founders disagreed on a great many things. The process of debating and ratifying the Constitution was tumultuous, discordant, and heavily politicized. *See generally* MICHAEL J. KLARMAN, THE FRAMERS' COUP (2016). But the Founders were in accord on one very important thing: Members of Congress should represent *all* of the persons within their districts—not just citizens, and not just voters. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016) ("As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote."); *see also* GORDON S. WOOD, THE CREATION OF

THE AMERICAN REPUBLIC, 1776-1787, at 170 (2d ed. 1998) (Of all "the electoral safeguards for the representational system," none "was as important to Americans as equality of representation.").

John Adams, a Federalist, and Thomas Jefferson, a Democratic Republican, were opposed to each other on many issues, but they agreed that equality of representation was a core principle of the new American political order. *See* John Adams, Letter to Joseph Hawley (Aug. 25, 1776), quoted in FOUNDING FAMILIES: DIGITAL EDITIONS OF THE PAPERS OF THE WINTHROPS AND THE ADAMSES (C. James Taylor ed., 2015) ("Equality of Representation in the Legislature, is a first Principle of Liberty, and the Moment, the least departure from such Equality takes Place, that Moment an Inroad is made upon Liberty."); Thomas Jefferson, Letter to William King (1819), Jefferson Papers, Library of Congress, Vol. 216, p. 38616 ("Equal representation [was] so fundamental a principle in a true republic that no prejudice [could] justify its violation . . . ."). Alexander Hamilton likewise expressed unequivocal support for the principle of equality of representation, stating, "[t]here can be no truer principle than this—that every individual of the community at large has an equal right to the protection of government." *Evenwel*, 136 S. Ct. at 1127.

This foundational principle of representational equality ultimately found its way into Article I, Section 2 of the Constitution, which provides that "Representatives . . . shall be apportioned among the several States which may be included within this

Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons . . . three fifths of all other Persons." U.S. CONST. art. I, § 2, cl. 3; *see also Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (stating that "equal representation for equal numbers of people" is "the fundamental goal for the House of Representatives"). Obviously and infamously, the Constitution as originally drafted, in distinguishing between "free Persons" and "all other Persons" and thereby ratifying slavery, fell woefully short of giving full effect to the principle. But even as written, Article I, Section 2 of the Constitution bases political representation on an individual's status as a "Person"—not as a citizen or a voter.

B. The Founders resolved the tension between the broad right to equal representation and the then-narrow right to vote by distinguishing in the Constitution between those who can vote and those who are counted for census purposes.

Although the Constitution provided for a broad right to representation for free persons, it did not, as originally drafted, give every free person the right to vote. Rather, the Constitution created a system where a limited subset of all persons would vote for the representatives who would represent all (free) persons. *See Evenwel*, 136 S. Ct. at 1127 ("[T]he basis of *representation* in the House was to include all inhabitants—although slaves were counted as only three-fifths of a person—even though States remained free to deny many of those inhabitants the

right to participate in the selection of their representatives."); *id.* at 1129 ("[I]t remains beyond doubt that the principle of representational equality figured prominently in the decision to count people, whether or not they qualify as voters.").

The Founders did not agree on the principle of universal enfranchisement. They limited the franchise to adult white males who satisfied various state-imposed religious tests and property requirements—amounting to only about 10%–20% of the total national population at the time. Richard Briffault, *Legal History: The Contested Right to Vote*, 100 MICH. L. REV. 1506, 1510 (2002); CONSTITUTIONAL RIGHTS FOUND., *Who Voted in Early America?*, BILL OF RIGHTS IN ACTION (Fall/Winter 1991). Even today, many persons who reside in the United States cannot vote. For instance, many states disenfranchise people who are in prison, on parole, on probation, or who have prior felony convictions. *See generally Felony Disenfranchisement Laws (Map)*, ACLU, https://www.aclu.org/issues/voting-rights/voter-restoration/felony-disenfranchisement-laws-map. America's 74 million people under the age of eighteen cannot vote in federal elections. *See* U.S. CONST. amend. XXVI; *QuickFacts*, U.S. Census Bureau, https://www.census.gov/quickfacts/. Voters who are mentally incompetent cannot vote in many states, such as California. *See, e.g.*, CAL. CONST. art. 2, § 4. Noncitizen immigrants who are authorized to be in the United States for work or education cannot vote in federal elections, nor can the 11 million undocumented immigrants who live here. Jens Manuel Krogstad et al., *5 Facts About Illegal Immigration in the U.S.*, PEW RES. CTR. (Apr. 27,

2017), http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s/.

Despite having limited views of the right to vote, the Founders believed that all persons—voters and nonvoters—deserved representation in Congress. As mentioned above, Alexander Hamilton declared: "There can be no truer principle than this—that every individual of the community at large has an equal right to the protection of government." *Evenwel*, 136 S. Ct. at 1127. Constitutional Convention delegate James Wilson explained, "equal numbers of people ought to have an equal n[umber] of representatives." 3 RECORDS OF THE FEDERAL CONVENTION OF 1787 (Farrand ed. 1911) 180 (quoted in *Wesberry*, 376 U.S. at 10-11). And James Madison wrote in *The Federalist*,

> It is a fundamental principle of the proposed Constitution, that as the aggregate number of representatives allotted to the several States is to be determined by a federal rule, founded on the aggregate number of inhabitants, so the right of choosing this allotted number in each State is to be exercised by such part of the inhabitants as the State itself may designate.

THE FEDERALIST No. 54 (James Madison); *see also Evenwel*, 136 S. Ct. at 1127. Thus, the Founders agreed that representatives would be apportioned based on the state's "aggregate number of inhabitants," while the state itself would decide which particular "part of the inhabitants" would be permitted to vote for those representatives.

The Founders included this concept in Article I by providing that those who cast their ballots as "Electors" do so on behalf of the broader "People":

> The House of Representatives shall be composed of Members chosen every second Year by **the People** of the several States, and **the Electors** in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

U.S. CONST., art. 1, § 2, cl. 1 (emphasis added); *cf. Evenwel*, 136 S. Ct. at 1132 ("By ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation."); *Shaw v. Reno*, 509 U.S. 630, 648 (1993) (congressional representatives are "obligat[ed]" to "represent . . . their constituency as a whole"). By permitting states to determine who shall qualify as an "Elector," while also apportioning representation uniformly based on the number of "People," the Constitution therefore provides for a hybrid system of representation.

C. The Fourteenth Amendment reaffirmed the representation of all persons as a foundational principle of our democracy.

The Fourteenth Amendment, which amended Article I, Section 2, reaffirmed and perfected the principle of representational equality. *See Evenwel*, 136 S. Ct. at 1128–29. The first sentence of the Fourteenth Amendment defines a "citizen[] of the United States" as any "person[] born or naturalized

in the United States, and subject to the jurisdiction thereof." U.S. CONST. amend. XIV, § 1. The next sentence contains the Equal Protection Clause, which protects "any person within [the] jurisdiction [of the States]." *Id.* The distinction introduced between "citizens" and "persons" makes clear that the Equal Protection Clause, in protecting "all *persons* within [a state's] territorial jurisdiction," is "not confined to the protection of citizens." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (emphasis added).

The Fourteenth Amendment then goes on to replace Article I, Section 2's reference to "the whole Number of free Persons" in the state with "the whole number of persons" in the state. U.S. CONST. amend. XIV, § 2. In reaffirming and expanding the principle of representation for "persons" in the same breath that it imparted a new definition of "citizens," the Fourteenth Amendment unmistakably provided that the right to political representation flows to persons, not citizens.

This reaffirmation was intentional and overt. During the debates over the Fourteenth Amendment, many in Congress sought a drastic change in our constitutional principles of equal representation, arguing that only citizens or voters should be counted in determining representation. *See Evenwel*, 136 S. Ct. at 1128. But, in the end, the Amendment retained—with its framers' and ratifiers' full awareness of the available alternatives—the commitment to apportionment based on total population. *See id.* ("The product of these debates was § 2 of the Fourteenth Amendment, which retained total population as the congressional

apportionment base."). The Framers of the Fourteenth Amendment decisively rejected apportionment based on a privileged subset of the whole population, choosing to cement the Constitution's commitment to apportionment based on total population, without regard to citizenship or enfranchisement. *See id.* (quoting Senator Jacob Howard introducing the final version of the Amendment: "[The] basis of representation is numbers . . . this is the theory of the Constitution.").

II. The administrative record demonstrates that the citizenship question will cause an undercount of noncitizens, thereby undermining equality of representation.

Secretary Ross's decision to add a citizenship question to the Census will depress the enumeration of noncitizens, people who live with noncitizens, and communities where a high percentage of noncitizens reside. In his March 26, 2018, memorandum announcing his decision to add this question, Secretary Ross stated, "while there is widespread belief among many parties that adding a citizenship question could reduce response rates, the Census Bureau's analysis did not provide definitive, empirical support for that belief." *New York*, 351 F. Supp. 3d at 544. But as the District Court found, this statement is not only unsupported—it is *conclusively refuted* by the Census Bureau's own analysis and by the calculations contained in the Administrative Record. *Id.* at 647-651.

The Census Bureau initially offered Secretary Ross a conservative estimate, indicating that, at a minimum, the citizenship question was likely to

cause a 5.1% decline in response rate among noncitizen households," and "would lead to an estimated minimum '154,000 *fewer* correct enumerations.'" *Id.* at 533 (quoting a January 3, 2018 Census Bureau internal memorandum). This was not conjecture on the part of the Census Bureau. Rather, the Bureau reported to Secretary Ross "three distinct analyses," considering three different causes of under reporting based on its experience with the American Community Survey ("ACS"): decreased response rates, "item nonresponse," and increased "breakoff rates." *Id.* at 534; *see also California v. Ross* (*California*), 2019 U.S. Dist. LEXIS 36230, at *22-24 (giving additional detail regarding item nonresponse and breakoff rates).

This assessment was reinforced after Secretary Ross requested that the Bureau provide him with a fourth option, "Alternative D," which combined the addition of a citizenship question with an increased reliance on administrative records. The Bureau concluded that Alternative D would still present the same problems, because the addition of administrative records would not diminish the negative impact of the citizenship question on response rate and accurate self-reporting. *New York*, 351 F. Supp. 3d at 536-39 ("Alternative D would produce *more* people who could not be linked to administrative records."); *California*, 2019 U.S. Dist. LEXIS 36230, at *134-36. In short, the Census Bureau presented Secretary Ross with clear, empirical, and definitive—not to mention unrebutted—evidence that the addition of the citizenship question would cause a differential undercount among noncitizens and Hispanics. *See New York*, 351 F. Supp. 3d at 583 ("[T]he Court finds

that the addition of a citizenship question to the 2020 census will cause an incremental net differential decline in self-response rates among noncitizen households of at least 5.8%. The court further finds that that estimate is conservative and that the net differential decline could be much higher."); *California*, 2019 U.S. Dist. LEXIS 36230, at *62-63 ("The Census Bureau concedes, based on its own natural experiment, that the citizenship question will cause the self-response rate of noncitizen households to decline at least 5.8 percent. The Census Bureau has also produced considerable qualitative research suggesting that the citizenship question will cause an even larger differential decline in the self-response rate of noncitizen households, and that these negative effects of the citizenship question will extend to other subpopulations, such as Hispanics." (citation omitted)).

Evidence in the administrative record of a telephone conversation between Secretary Ross and Kris Kobach, the then-Kansas Secretary of State, suggests that the decision to add a citizenship question was because of, not in spite of, its likely adverse impact on the enumeration of noncitizen persons. The record shows Ross and Kobach discussed "the potential effect on 'congressional apportionment'" of adding the citizenship question. *New York*, 351 F. Supp. 3d at 550. More specifically, Kobach highlighted "the *problem* that aliens who do not actually 'reside' in the United States are still counted for congressional apportionment purposes." *Id.* at 552 (emphasis added); *California*, 2019 U.S. Dist. LEXIS 36230, at *110. In other words, Kobach sought to convince Secretary Ross to add a citizenship question to the Census in order to solve "the

problem" created by the counting of noncitizens—even though such counting is clearly mandated by the text of the Constitution and is what the Founders intended.

The administrative record is clear. Secretary Ross was informed, both by the career staff at the Census Bureau tasked with upholding the integrity and accuracy of the Census and by those pursuing their own political ends that the addition of the citizenship question was likely to make the Census less accurate. More specifically, he was informed that the addition of such a question would likely cause noncitizens to be undercounted, thereby undermining the foundational constitutional principle of equality of representation.

III. Secretary Ross's decision to ignore the clear and uncontroverted evidence that adding the citizenship question would undermine equality of representation violates both the Enumeration Clause and the APA.

The Court's analysis of Plaintiffs' APA claims—and of the Enumeration Clause should the Court reach that issue—should be informed by Secretary Ross's failure to adequately consider how his decision undermines the core constitutional commitment to representational equality. By willfully turning a blind eye to the constitutional issues with his decision to add the citizenship question to the 2020 Census, Secretary Ross violated both the procedural and substantive requirements of the APA.

As the District Court recognized, Secretary Ross's decision did not consider the relevant data or articulate a satisfactory explanation. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). His explanation for his decision—that it would aid in enforcement of the Voting Rights Act ("VRA")—was irrational, because the addition of the citizenship question would actually undermine representation of those whom the VRA is intended to protect. *See id.* (an agency may not make a "decision that runs counter to the evidence"); *see also New York*, 351 F. Supp. 3d at 647 ("[I]n a startling number of ways, Secretary Ross's explanations for his decision were unsupported by, or even counter to, the evidence before the agency."). And it was pretextual; the evidence in the administrative record shows that the decision to add the question was made long before the VRA rationale was concocted. *New York*, 351 F. Supp. 3d at 660-64 ("The sole rationale Secretary Ross articulated for his decision . . . was pretextual."); *California*, 2019 U.S. Dist. LEXIS 36230, at *195-96 ("[S]ection 2 enforcement did not supply the true basis of Secretary Ross's decision and . . . he disclosed no other basis. Secretary Ross has therefore violated the APA by failing to disclose the actual basis for his decision to add a citizenship question to the 2020 Census.").

Based on the record, it is evident that the citizenship question is likely to artificially depress the response rate of both documented and undocumented immigrants, and thereby to diminish the representation and provision of government services to the communities in which they live. *Cf. Utah v. Evans*, 536 U.S. 452, 500-01 (2002) (Thomas,

J., concurring in part and dissenting in part) ("The Framers knew that the calculation of populations could be and often were skewed for political or financial purposes. Debate about apportionment and the census consequently focused for the most part on creating a standard that would limit political chicanery."). Secretary Ross failed to adequately consider this impact. In fact, he ignored it entirely. But under the APA, an agency simply cannot ignore serious and legitimate constitutional questions that have been raised during the administrative process, and then proceed to enact a policy that violates the Constitution. Secretary Ross's decision to add a citizenship question to the 2020 Census violates both the procedural and substantive requirements of the APA—as well as the Enumeration Clause itself.

CONCLUSION

The Court should enjoin Secretary Ross's decision to add the unnecessary citizenship question to the 2020 Census because it violates both the Enumeration Clause and the procedural and substantive requirements of the APA. As described here, Secretary Ross's decision is also inconsistent with the values enshrined in the Constitution by the Founders and reaffirmed by the Congress that enacted the Fourteenth Amendment. The addition of this question will depress representation of communities with significant noncitizen populations that deserve to be adequately represented. Further, it undermines the core constitutional value that the Enumeration Clause of Article I, Section 2 seeks to protect. The Court's analysis should be informed by the unavoidable reality that Secretary Ross's decision will undermine the very purpose for which

the Census exists, namely the "actual Enumeration" of "the whole number of persons in each state." U.S. CONST. art. 1, § 2, cl. 3; *id.* amend. XIV, § 2.

April 1, 2019

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